SUPREME COURT, U. S.

DEC 14 1973

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-928

SAMUEL NORMAN ROEDER,
husband and EDITH ROEDER,
wife
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 71-1769

SAMUEL NORMAN ROEDER,
husband and EDITH ROEDER,
wife
Petitioners

v.

GENERAL MOTORS CORPORATION
Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinions and orders of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit have not been reported. A copy of these opinions appears in the Appendix.

JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C.A. Section 1254. The United States District Court for the Eastern District of Pennsylvania entered judgment on the jury verdict for defendant and denied plaintiffs' motion for judgment N.O.V. or, in the alternative, for a new trial on June 30, 1971. The United States Court of Appeals for the Third Circuit affirmed in a per curiam decision on September 7, 1973. A rehearing was denied en banc on October 5, 1973.

QUESTION PRESENTED

Whether it was error for the trial court, in a diversity action, under Pennsylvania law, based on Section 402A of the Restatement of Torts, 2d, to instruct the jury on contributory

negligence without also charging that the defendant had the burden of proof on that issue.

STATEMENT OF THE CASE

This is a products liability diversity action based upon defendant's strict liability in tort for selling plaintiff a Corvair whose right rear wheel collapsed, causing plaintiff severe injuries.[1]

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1. Roeder was thrown out of the car and then the car rolled on his chest, in a crushing blow fracturing his sternum and skull. Roeder's right ear was amputated. He is now cross-eyed in both eyes. He also has double vision when both eyes are open, and therefore, he wears a patch over one eye at all times. He has poor depth perception. His taste and hearing are both severely impaired bilaterally. He has facial weakness bilaterally. Five doctors testified for plaintiff. The defense called no medical witnesses. Roeder, a former Little All American fullback at Franklin and Marshall, was in excellent health prior to the accident. He is presently a grotesque figure.

On October 29, 1965, plaintiff, SAMUEL NORMAN ROEDER, (hereafter Roeder), bought a brand new 1965 Corvair from the Palmerton Motor Corporation (N.T. 300). Sixteen days later on November 14, 1965, at 12:30 a.m. Roeder was driving east on Towamensing Road in Palmerton, Pennsylvania. The roadway was slightly downgrade and dry (N.T. 9, 334). Towamensing Road runs east and west (N.T. 10).[2] It is a two land macadam highway, 22 feet wide with a 2-3 foot shoulder which was below the macadam about one-half inch to one inch (N.T. 10). The road and shoulder were in new condition. (N.T. 303).

Roeder had traveled the road thousands

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2. Towamensing Road, which runs east and west is intersected by Sand Quarry Road which runs north and deadends at Towamensing. At this point on the north side of Towamensing Road, there is a shale quarry.

of times back and forth from home to work. (N.T. 304).

Just prior to the collapse of the wheel, Roeder had been traveling about 20 to 25 miles per hour (N.T. 306). Then as he came out of a slight lefthand curve in the road, the right rear of the Corvair pulled slightly to the right. Roeder tried to keep his car going straight but he could not prevent both front and rear right tires from going on the shoulder (N.T. 306). Roeder then saw a telephone pole directly ahead and turned his car at a 30 degree angle back onto the road, when there was a thump in the right rear and the right rear dropped (N.T. 307, 308, 337, 338). Roeder tried to stop his car but the pedal went to the floor (N.T. 338). Going at only 15 miles per hour, Roeder steered the Corvair across Towamensing Road towards a shale quarry area a few feet north of the road

(N.T. 338). Roeder heard a metallic sound as his car went across the road (N.T. 309). The Corvair went up a sand embankment two to three feet high which embankment sloped down toward the right (N.T. 145). The Corvair then turned over on its right side throwing Roeder from the car and rolling over him. (N.T. 309).

Plaintiff's expert witness testified that the accident was caused by a collapse of the right rear suspension system (N.T. 306). Over the objections of plaintiff (N.T. 558, 567), the Court charged the jury on a contributory negligence theory denominated by the defendant as "driver error" (N.T. 601, 606). The District Court did not instruct the jury that the defendant had the burden of proving contributory negligence.

The jury returned a general verdict

for the defendant. Plaintiff's motions for judgment notwithstanding the verdict and a new trial were denied. This was affirmed in a summary opinion by the Third Circuit. Plaintiff now seeks a writ of certiorari.

ARGUMENT

IN A DIVERSITY ACTION, UNDER PENNSYLVANIA LAW, BASED ON §402 A OF THE RESTATEMENT OF TORTS, 2d, IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY ON CONTRIBUTORY NEGLIGENCE WITHOUT ALSO CHARGING THAT THE DEFENDANT HAD THE BURDEN OF PROOF ON THAT ISSUE

In submitting the defendant's theory of "driver error" in the manner it did, the trial court instructed the jury contrary to existing Pennsylvania law. Section 402 A of the Restatement was adopted as Pennsylvania law on the subject of strict liability in the

case of Webb v. Zern, 422 Pa. 324, 223 A.2d 746 (1966). This was further amplified in Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966) where contributory negligence in the sense of voluntary assumption of the risk, as set forth in comment"n" to Section 402 A of the Restatement[3] was adopted as law. This, of course, is an affirmative defense requiring the defendant to sustain the burden by a preponderance of the evidence.

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3. This provision states in part:

". . . the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

In negligence actions, the Supreme Court of Pennsylvania has held that the trial judge must instruct the jury that the defendant has the burden of proving contributory negligence and voluntary assumption of risk. Brown v. Jones, 404 Pa. 513, 172 A.2d 831 (1961); Sarne v. Baltimore & Ohio R. Co., 370 Pa. 82, 87 A.2d 264 (1952). In Brown, a jury verdict for the defendant was reversed because the trial judge failed to give the proper instruction on where the burden lies on the issue of contributory negligence. In fact, the duty of the trial judge is so exacting that a misleading instruction is sufficient cause to require a new trial. Sullivan v. County of Allegheny, 187 Pa. Super, 370, 144 A.2d 498 (1958).

This principle holds true not merely in negligence actions, but any time the affirma-

tive defenses of contributory negligence or voluntary assumption of the risk are raised. In fact, the court below, using Pennsylvania law in another Section 402 A case, has held that this burden is on the defendant and that the judge must so charge. Henrich v. Cutler Hammer Co., 460 F.2d 1325 (3d Cir. 1972).

In the case at bar, the defendant used the theory of driver error as a cloak for contributory negligence. When the court instructed the jury on that theory and failed to include a charge that the burden of proof was on the defendant, it committed prejudicial error requiring a new trial.

A close look at the testimony and the court's charge bears this out. Defendant's expert, Mr. Conklin, on direct examination in response to hypothetical question, stated that the cause of the accident, in his opinion, was "driver error" (N.T. 410-415).

The Court charged the jury on driver error, on two occasions, as follows:

> The defendant contends that there was no defect in this automobile and that the accident was caused by driver error. (N.T. 601).

Again, the jury was instructed to consider driver error

> . . . in determining whether or not the plaintiffs have met their burden of proof by a preponderance of the evidence first that there was a defect in the car when it was sold and that the defect created an unreasonable risk of danger and that it proximately caused the accident. (N.T. 606).

In failing to charge the defendant had the burden of proof on this issue, the Court radically departed from existing Pennsylvania law and committed prejudicial error. As a result, the Court should have granted plaintiff's

motion for a new trial. Grochowski v. Ardes, 402 Pa. 614, 168 A.2d 327 (1961).

CONCLUSION

For the reasons stated herein, plaintiff prays this Court to grant the Petition for a writ of certiorari.

Respectfully Submitted,

MONHEIT AND ROSENFIELD

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Attorney for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMUEL NORMAN ROEDER, husband and EDITH ROEDER, wife, Plaintiffs,	:	No. 10240 Civil
v.	:	
GENERAL MOTORS CORPORATION, Defendant.	:	

ORDER

This cause came on to be heard on motion of the plaintiffs, Samuel Norman Roeder and Edith Roeder, to set aside the verdict of the jury in favor of the defendant, General Motors Corporation, and to enter judgment in favor of the plaintiffs in accordance with the motion for a directed verdict made by the plaintiffs at the close of all the evidence, and in the alternative for a new trial, and the court having heard the arguments of counsel, and being fully advised,

It is ORDERED that the motion be and the same hereby is denied.

/s/ Michael H. Sheridan

Chief Judge
Middle District of Pennsylvania

Dated: June 30, 1971.

FILED
JUN 30 1971
T. H. CAMPBELL, Clerk

UNITED STATES COURT OF APPEALS
For The Third Circuit

NO. 71-1769

SAMUEL NORMAN ROEDER, husband
and EDITH ROEDER, wife,

Appellants,

v.

GENERAL MOTORS CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6) September 7, 1973
Before STALEY, HASTIE and GIBBONS, Circuit Judges

J U D G M E N T O R D E R

Appellant contends (1) that the district court should have granted judgment for plaintiff n.o.v., (2) or alternatively should have granted a new trial. The evidence sustains the verdict. Appellant contends that the court erred in submitting to the jury defendant's theory that driver error was the proximate cause of the accident. We find no error.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed. Costs to appellee.

By the Court,

JOHN J. GIBBONS
Circuit Judge

Attest:
Thomas F. Quinn
Clerk

Dated: September 7, 1973